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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1984

THE CORPORATE CITY OF SOUTH BEND, BOARD OF PUBLIC WORKS, SOUTH BEND FIRE DEPARTMENT, MAYOR ROGER PARENT, TIMOTHY BRASSELL, FIRE CHIEF, ROBERT POTVIN, BOARD OF PUBLIC SAFETY and STANLEY M. PRZYBYLINSKI, BOARD OF PUBLIC SAFETY,

Petitioners,

v.

TIMOTHY JANOWIAK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Whether 42 U.S.C. §2000e and the Constitution permit a public safety employer to rely upon evidence of apparent racial discrimination to adopt voluntarily an affirmative action hiring plan.

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OPINIONS BELOW

The opinion of which review is sought is reported at 750 F.2d 557 (7th Cir. 1984), and is reproduced at pages 6a-39a of the Appendix. The district court opinion is reported at 576 F.Supp. 1461 (N.D. Ind. 1983), and is included at pages 42a-73a of the Appendix.

JURISDICTION

The Seventh Circuit Court of Appeals decided this case on December 6, 1984. A timely Petition for Rehearing was filed by the Defendants-Appellees, but it was denied on March 11, 1985.

This court's jurisdiction arises pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This action is based in part upon the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, which provides in pertinent part:

> ...nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The statutory provisions involved are:

(1) 42 U.S.C. §1983:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be

liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

(2) 42 U.S.C. 2000e(a)(1):

(a) It shall be an unlawful employment practice for an employer - (1) To fail or refuse to hire or to discharge any individual, ... because of such individual's race, color, religion, sex, or national origin;...

(3) I.C. 18-1-11-1, (Recodified at I.C. 36-8-3-2) (Appendix-Page 1.)

STATEMENT OF THE CASE

A. Facts and Background

In 1980, after nearly a year of public meetings, the Board of Public Safety of the City of South Bend, Indiana, (hereinafter all Petitioners will be referred to as "City" unless the context clearly indicates otherwise) adopted the findings and

recommendations contained in two reports concerning the history of recruitment and hiring of minorities in the South Bend Police and Fire Departments. The recommendations in these reports formed the basis for future hiring procedures in those departments. The South Bend Board of Public Safety had the responsibility for the operation of those departments under the then applicable Indiana statute, I.C. 18-1-11-1.

While the reports did not point to any overt discrimination, they found that the racial composition of the two departments had never been reflective of the community and that the recruitment records prior to 1978 were insufficient to allow any thorough

analysis. The reports also pointed out that the aggressive recruitment of minorities attempted in 1978 did not make any difference in the percentage of minorities hired and was not likely to do so in the future. The recommended goal for the future hiring procedures was to bring the racial composition of both departments in line with the racial composition of the city within five years by using two lists of applicants who successfully passed all requirements.

In accordance with the recommendations adopted, the Board of Public Safety commenced recruitment for both firefighter and police hiring. Timothy Janowiak applied in July of 1980 for a position with the Fire Department; he

had the second highest score on the list of successful non-minority Fire Department applicants. In accordance with the five-year goal, the Board selected four applicants from the minority list and one from the non-minority list. Janowiak at that time had the highest score on the waiting list for non-minorities, but was never hired by the City.

On May 19, 1982, Janowiak filed suit against the City, alleging that he was denied employment contrary to the Fourteenth Amendment of the United States Constitution, §42 U.S.C. §1983 and 2000e(2)(a)(1). District court jurisdiction was based on 28 U.S.C. §1331 and §1343 and 42 U.S.C. §2000e-5(f)(3), and the case was filed in the

United States District Court for the Northern District of Indiana, South Bend Division.

B. Decisions Below

After the time for discovery had lapsed, the City filed for Summary Judgment. On December 29, 1983, the City won summary judgment on all counts. The district court held that the Board of Public Safety of the City of South Bend was a body competent to adopt an affirmative action plan. The district court further held that since the minority population of South Bend was three times as great as the percentage of minorities employed by the police and fire departments, there was a sufficient basis for adopting an affirmative action plan, irrespective

of whether there was any overt discrimination. Also the district court held that the plan in question was reasonable.

Janowiak filed a Motion to Set Aside the Order Granting Summary Judgment on January 13, 1984. On January 31, 1984 the district court denied the motion. On February 29, 1984, a Notice of Appeal was filed with the Seventh Circuit Court of Appeals. Oral argument occurred on September 12, 1984, and on December 6, 1984, the Seventh Circuit reversed the grant of summary judgment and remanded to the district court for further proceedings. In so doing, the Seventh Circuit affirmed the district court ruling that the Board of Public Safety had the

power to make findings of past discrimination and undertake an affirmative action plan. However, the Seventh Circuit also held that statistical disparity without more cannot be the basis for a finding of past discrimination, and that such a finding is a prerequisite to the adoption of a valid affirmative action plan. The City filed a Petition for Rehearing on December 20, 1984. On March 11, 1985, with one dissenting vote, the Petition for Rehearing was denied.

REASONS FOR GRANTING THE PETITION

I. THE SEVENTH CIRCUIT'S DECISION SQUARELY CONFLICTS WITH THIS COURT'S DECISION IN UNITED STEELWORKERS OF AMERICA V. WEBER BY HOLDING THAT 42 U.S.C. §2000e REQUIRES PROOF OF INTENTIONAL DISCRIMINATION AS A PREREQUISITE TO AN EMPLOYER'S ADOPTION OF A VOLUNTARY AFFIRMATIVE ACTION HIRING PLAN.

This Court has spoken clearly and eloquently in United Steelworkers of America v. Weber, 443 U.S.193, 99 S.Ct. 2721, 61 L.Ed.2d 480 (1979) concerning the circumstances under which an employer may adopt an affirmative action hiring plan. The more recent decision of Firefighers Local Union No. 1784 v. Stotts, _U.S._, 104 S.Ct. 2576, 81 L.Ed.2d 483 (1984) does not in any way cloud the clarity of the Weber decision, for that case concerns layoffs only.

In Weber the craft union and the employer corporation entered into a collective bargaining agreement concerning conditions of employment at various plants operated by Kaiser. The agreement included an affirmative action plan, which provided for in-house training to fill new "skilled labor" positions, and further provided that fifty percent of the openings would be reserved for minorities. On challenge both the district court and the Fifth Circuit held that the hiring plan violated Title VII. Weber v. Kaiser Aluminum & Chemical Corporation, 563 F.2d 216 (5th Cir. 1977); Weber v. Kaiser Aluminum & Chemical Corporation, 415 F.Supp. 761 (E.D. La. 1976). At the trial no evidence was

offered to show that either the corporation or the craft union was guilty of any intentional discrimination at the plant in question or anywhere else. Weber v. Kaiser Aluminum & Chemical Corporation, supra, at 563 F.2d. 224. The only evidence was that there was a racial imbalance.

This Court held that no portion of Title VII forbids an employer from taking "voluntary affirmative efforts to correct racial imbalances." United Steelworkers v. Weber, supra, 433 U.S. 193 at 207. The Court held the Weber plan did not violate Title VII because it contained the following attributes: (1) "[t]he purposes of the plan mirror those of the statute;" (2) "[t]he plan does not require the discharge of white

workers and then a replacement with new black hires;" (3) "[n]or does the plan create an absolute bar to the advancement of white employees;" (4) "[m]oreover, the plan is a temporary measure; it is not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance." Id.

In the instant case, the Seventh Circuit, in reversing summary judgment in favor of City on the Title VII count, did not deny that all of the Weber factors were present. The record clearly showed that each factor was present and there was no genuine issue of material fact as to any of them. See district court opinion, Appendix-Page 63a-66a.

The Seventh Circuit, rather than relying upon the language and rationale of Weber, seized upon and added its own emphasis to footnote 1, Weber, supra, at 198, which reads as follows:

> Judicial findings of exclusion from crafts on racial grounds are so numerous as to make such exclusion a proper subject for judicial notice. [Citations omitted]

The Seventh Circuit refused to recognize the validity of the City's attempt to respond to findings of significant statistical racial disparity by its adoption of a voluntary affirmative action hiring plan. (Appendix, Page 27a).

The Seventh Circuit also failed to recognize and take judicial notice of the substantial evidence of histor-

ical, institutional racial discrimination in public safety employment.

Just as it was the right of the Court to take judicial notice of racial discrimination in Weber, supra, any court hearing or reviewing this case can take judicial notice that public safety employers' closets are also filled with the skeletons of past discrimination. Judicial findings of exclusion from public safety employment on racial grounds are so numerous as to make such exclusion a proper subject for judicial notice: League of United Latin America Citizens v. Santa Ana, 410 F.Supp. 873 (C.D. Cal. 1976); Craig v. County of Los Angeles, 626 F.2d 659 (9th Cir. 1980); United States v. City of Chicago, 549 F.2d 415

(7th Cir. 1977), cert. denied, 434 U.S. 875 (1977); Association Against Discrimination in Employment, Inc. v. City of Bridgeport, 647 F.2d 256 (2nd Cir. 1981), cert. denied, 455 U.S. 988 (1982), aff'd 710 F.2d 69 (2nd Cir. 1983); Guardians Association of the New York City Police Dept., Inc. v. Civil Service Commission of the City of New York, 463 U.S. 582, 103 S.Ct. 3221, 77 L.Ed. 2d 866, (1983). Hamer v. City of Atlanta, 450 F.Supp. 771 (N.D. Ga. 1978); Boston Chapter, NAACP, Inc. v. Beecher, 504 F.2d 1017 (1st Cir. 1974), cert. denied, 421 U.S. 910 (1975); Vulcan Society of New York City Fire Department v. Civil Service Commission, 490 F.2d 387 (2nd Cir. 1973); Maehren v. City of Seattle,

92 Wash. 2d 480, 599 P.2d 1255 (1979), cert. denied, 452 U.S. 938 (1981); Firefighters Institute for Racial Equality v. City of St. Louis, Mo., 549 F.2d 506 (8th Cir. 1977), cert. denied, 434 U.S. 819 (1977); Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1972), cert. denied, 406 U.S. 950 (1972).

An examination of the legislative history of the 1972 Amendments to Title VII indicates that Congress considered such amendments imperative due of widespread discrimination throughout the public sector:

> In a report released in 1969, the U.S. Commission on Civil Rights examined equal employment opportunity in public employment in seven urban areas located throughout the country - North as well as South. The report's findings indicate that widespread discrim-

> ination against minorities exists in State and local government employment, and that the existence of this discrimination is perpetuated by the presence of both institutional and overt discrimination practices. The report cites widespread perpetuation of past discriminatory practices through de facto segregated job ladders, invalid selection techniques, and stereotyped misconceptions by supervisors regarding minority group capabilities. The study also indicates that employment discrimination in State and local governments is more pervasive than in the private sector.

H.R. Rep. No. 238, 92d Cong., 2nd Sess., reprinted in 1972 U.S. Code Cong. & Ad. News 2137.

The Seventh Circuit's use of footnote 1 is a perversion of Weber and the overall intent of the 1972 Amendments to the Civil Rights Act of 1964. As a result the public safety employer must show non-statistical evidence of its own discriminatory acts.

The Seventh Circuit's reading of Weber is incorrect for other reasons. It ignores the fact that Janowiak, after extensive opportunity for discovery, presented no question of fact which could rebut the the statistical inference that past practices of the City indicated a disparate impact on minorities. Griggs v. Duke Power Company, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971).

The Seventh Circuit also incorrectly assumes that, because Janowiak's case involved a Title VII suit, only a Title VII violation could justify the City's affirmative action plan. In Guardians Association of the New York City Police Dept., Inc. v. Civil

Service Commission of the City of New York, supra, a case brought under under Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d et seq., this Court held that a public safety employer could be enjointed from taking actions based on scores of tests having a discriminatory effect.

The Seventh Circuit's decision places the City in an absurd position:

> If the City has evidence of a significant statistical racial disparity and does not voluntarily act to correct it, the City could lose a Title VI court challenge by a minority.
>
> If the City has evidence of a significant statistical racial disparity and voluntarily acts to correct it, the City could lose a Title VII court challenge by a non-minority.

For these reasons, it is respectfully submitted that the Seventh

Circuit contradicts United Steelworkers of America v. Weber, supra, by imposing upon a public safety employer a requirement to fund more than a significant statistical disparity as a basis for a voluntary affirmative action hiring plan.

II. THE CIRCUITS HAVE CREATED AN IRRECONCILABLE CONFLICT OVER WHETHER PUBLIC EMPLOYERS MAY ADOPT AFFIRMATIVE ACTION PLANS BASED SOLELY ON STATISTICAL DISPARITY.

A. The Seventh Circuit's Decision Squarely Conflicts With The Second And Ninth Circuits' Decisions By Holding That 42 U.S.C. §2000e Requires Proof Of Intentional Discrimination As A Prerequisite To An Employer's Adoption Of A Voluntary Affirmative Action Plan.

The Second and Ninth Circuit Courts of Appeal have firmly held that voluntary affirmative action plans undertaken by public employers are

permissible even if they have no basis other than statistics. In Bushey v. New York Civil Service Commission, 733 F.2d 220 (2nd Cir. 1984), cert. denied, _U.S._, 83 L.Ed.2d 795, 105, S.Ct. 803 (1985), the New York Civil Service Commission gave certain promotion tests. When the results were in, the Commission found that the passing rate for non-minorities was approximately twice that of minorities. Based on this statistical disparity and the lack of any apparent explanation for the disparity other than the racial bias of the test, the Commission adjusted the minority candidates' test scores, making the passing rate of minorities approximately equal to that of non-minorities.

The Second Circuit agreed with the district court that the Commission had made a prima facie showing of adverse racial impact:

> In short, we hold ... a showing of a prima facie case of employment discrimination through a statistical demonstration of disproportionate racial impact constitutes a sufficiently serious chain of discrimination to serve as a predicate for employer-initiated, voluntary race-conscious remedies.

Id. at 228.

Two days before the Seventh Circuit rendered its decision in the instant case, the Ninth Circuit rendered a diametrically opposed decision in Johnson v. Transportation Agency, Santa Clara County, California, 748 F.2d 1308 (9th Cir. 1984). Johnson involved in-house promotions,

for which passing a test was a prerequisite. The promotion was awarded to a female despite the fact that her test score was lower than plaintiff's. The promotion was made under a voluntary affirmative action plan which specified no past discrimiatory practices by the employer but stated that women had been traditionally underrepresented in certain job classificcations.

The Ninth Circuit reversed the district court:

> In order to demonstrate that its plan is remedial, an employer need not show its own history of purposeful discrimination. It is sufficient for the employer to show a conspicuous imbalance in its work force.

Id. at 1313. The Ninth Circuit found even societal discrimination a basis

for a public employer's adoption of a voluntary affirmative action plan.

The Second and Ninth Circuits clearly hold that statistical evidence which is sufficient to show a prima facie case in a Title VII suit is an acceptable basis for a voluntary affirmative action plan adopted by a public employer. No proof of any intentional discrimination by a particular employer is necessary. These cases cannot be reconciled with the position of the Seventh Circuit in the instant case.

B. The Seventh Circuit's Decision Squarely Conflicts With The Sixth And Eighth Circuits' Decisions By Holding That The Fourteenth Amendment Requires Proof Of Intentional Discrimination As A Prerequisite To A Public Employer's Adoption Of A Voluntary Affirmative Action Plan.

The Eighth Circuit quite recently discussed this very issue in Warsocki v. City of Omaha, 726 F.2d 1358 (8th Cir. 1984), in which an applicant for a firefighter position brought suit under the Fourteenth Amendment. Omaha used a single eligibility list, but its affirmative action plan required that 40% of those referred for selection be "protected class individuals." Ultimately, eleven individuals were hired who were lower on the eligibility list than Warsocki.

The Eighth Circuit adopted a two prong test to determine the constitutionality of a public employer's affirmative action plan: (1) the plan must be a remedial response to a conspicuous racial imbalance in its workforce; and

(2) the plan must be substantially related to the object of remedying past discrimination. The Eighth Circuit specifically held that statistical imbalance alone can supply the basis for the enactment of an affirmative action plan. Id. at 1360. Nowhere did it suggest that the constitutionality of the plan depends upon a finding of past intentional discrimination.

While Warsocki v. Omaha, supra, offers the most succinct analysis of the Constitutional requirements for an affirmative action plan, Bratton v. City of Detroit, 704 F.2d 878 (6th Cir. 1983), cert. denied, _U.S._, 104 S. Ct. 703 (1984) offers the most detailed. Detroit's affirmative action plan mandated two separate lists, with

promotions made alternatively from each list, white and black.

In its analysis of the Fourteenth Amendment claims, the Sixth Circuit quotes from its previous decision in Detroit Police Officers Association v. Young, 608 F.2d 671, 694 (6th Cir. 1979):

> A direct showing of past intentional discrimination is not required to establish the existence of this interest, however. It is sufficient if findings are made by a body with the competentence to act in this area and a review of those findings reveals "a sound basis for concluding that minority under-representation is substantial and chronic, and that the handicap of past discrimination is impeding access (and promotion) of minorities."

Bratton, supra, at 886.

An even more recent case, Wygant v. Jackson Board of Education, 746

F.2d 1152, 1156 (6th Cir. 1984), cert. granted, _U.S._(1985), holds that an affirmative action plan is constitutional if it is "substantially related" to the objectives of remedying past discrimination and correcting substantial and chronic underrepresentation. It is unnecessary to show that the underrepresentation is either purposeful or intentional. It is enough that it is chronic and substantial.

While most reverse discrimination plaintiffs have sought relief under the less stringent standards of Title VII rather than Section 1983, all circuits considering the question, except the Seventh Circuit, hold that statistical evidence of conspicuous racial

imbalance is sufficient to justify a voluntary affirmative action plan.

III. THE DECISION OF THE SEVENTH CIRCUIT MAKES IT VIRTUALLY IMPOSSIBLE FOR A PUBLIC EMPLOYER TO EVER ADOPT AN AFFIRMATIVE ACTION PLAN WITHOUT ACCOMPANYING COURT ACTION.

The true loser in the Seventh Circuit's decision is the federal court system. Compromise is part of the American character and intertwined with the history of the Constitution itself. But for Title VII, as for few other statutes or areas of law, compromise is an integral part of the grand congressional scheme:

> Cooperation and voluntary compliance were selected as the preferred means for achieving this goal (of elimination of unlawful employment discrimination.)

Alexander v. Gardner-Denver Company, 415 U.S. 36, 44, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974). With this legislation, Congress did not just give a new right or shift the burdens of proof during trial. Most importantly, Congress set up a procedure to encourage the settlement of employment discrimination cases before they ever enter the court system. For, as the Weber Court stated, supra, at 206: "The natural inference is that Congress chose not to forbid all voluntary race-conscious affirmative action."

The reasons for Congress' choice are evident from the legislative record. Title VII could not have been enacted in 1964 without substantial support from legislators in both houses

who traditionally resisted federal regulation of private business.

> Those legislators demanded as a price for their support that "management prerogatives and union freedoms ... be left undisturbed to the greatest extent possible." H.R. Rep. No. 914, 88th Cong., 1st Sess., Pt. 2 (1963), at 29. ...Clearly, a prohibition against all voluntary, race-conscious, affirmative action efforts will disserve these ends. Such a prohibition would augment the powers of the Federal Government and diminish traditional management prerogatives while at the same time impeding attainment of the ultimate statutory goals.

Weber, supra, at 206, 207.

A requirement that an employer, public or otherwise, must prove discrimination beyond a prima facie case equally impedes the attainment of the statutory goals. In his concurring opinion in Weber, supra, at 209,

Mr. Justice Blackmun pointed out that there would be no advantage to the employer if he has to admit actual discrimination. Any desire to right past wrongs would be more than tempered by the fact that this public penance would be performed in front of potential plaintiffs. What the employer would be attempting to achieve, a reduction of liability, would not result. The employer might as well bring a class action against itself and allow a default judgment to be entered.

No employer will do so, and no voluntary affirmative action plans will be enacted unless they have been preceded by a court decision finding the employer guilty of discrimination.

This will inject not only great delay into the satisfactory resolution of a particular problem but into the entire court system.

The congestion can be avoided and the statutory purposes of Title VII best achieved by overturning the decision of the Seventh Circuit in this case and by establishing clearly that all employers may legally and constitutionally adopt reasonable affirmative action plans when they are faced with and rely upon in good faith the same kind of evidence which establishes a prima facie Title VII case.

CONCLUSION

The decision of the Seventh Circuit below squarely conflicts with the decisions of the Second, Sixth, Eighth, and Ninth Circuits as well as this Court's decision in United Steelworkers v. Weber, supra. It has been six years since this Court decided that case, and it is now time for the Court finally to define in detail the line of demarcation between permissible and impermissible affirmative action plans and to give employers the guidance they need when faced with substantial statistical evidence of past discrimination.

Therefore, for the above stated reasons, petitioners respectfully urge

this court to grant review on the writ of certiorari.

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APPENDIX A

I.C. 18-1-11-1

I.C. 18-1-11-1

Section 1. The department of public safety shall be under the charge of a board of three (3) commissioners to be appointed by the mayor of such city, as hereinbefore provided: Provided, however, That in cities of the third class, on the adoption of an ordinance therefor, and in cities of the fourth class without such ordinance, the board of public works, in addition to its powers and duties as such board, shall exercise all the powers and perform all the duties in this act assigned to and required of the board of public safety. Not more than two (2) of such commissioners shall be of the same political party. Such commissioners shall each give bond to such city in the sum of three

thousand dollars ($3,000), to be approved by and filed with the city comptroller, for the faithful performance of their duties respectively, as required by this act and by ordinance. Such board shall have the care, management, supervision and exclusive control of all matters and property relating to or connected with the fire and police forces, to the fire alarm, telegraph, fire escapes, the inspection of buildings and boilers, market places and the food sold therein, and to pounds and prisons. Such board shall have power to purchase all necessary supplies and apparatus and make all repairs needed in its department, subject to the same provisions as are in this act prescribed for the exercise of similar powers by the department of

public works. Such commissioners, in cities of the first class, shall receive an annual salary of twelve hundred dollars ($1200) each; and, in cities of the second and third classes, an annual salary of four hundred dollars ($400) each. Such salaries shall be in full compensation whatever for all services of such commissioners. All persons so appointed shall serve during good behavior and shall be of good moral character and be able to speak and write the English language. Such commissioners shall have power, for cause assigned on a public hearing, and on due notice, according to rules to be promulgated by them, to remove or suspend from office, or for a definite period deprive of pay, any officer or member of such police force, except

that detectives may be dismissed at any time by said commissioners, and they shall have power to make general and special rules and regulations for the government and discipline of said force, and to make and promulgate general and special orders to said force, through the superintendent of police, who shall be the executive head of the force: And, provided further, That, in any city in which a board of metropolitan police commissioners is now or may hereafter be established by law, such board of metropolitan police commissioners shall have full control and management of the police officers of such city, in accordance with the laws providing for the creation of such boards and prescribing the duties of such police commissioners, and nothing

herein shall be construed as affecting the control or management of the police department in any city or cities now or hereafter operating under the laws establishing such board of police commissioners.

APPENDIX B

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT IN

JANOWIAK V. CITY OF SOUTH BEND

750 F.2D 557 (7th Cir. 1984)

IN THE

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

No. 84-1321

TIMOTHY JANOWIAK,

Plaintiff-Appellant,

v.

THE CORPORATE CITY OF SOUTH BEND, BOARD OF PUBLIC SAFETY, SOUTH BEND FIRE DEPARTMENT, MAYOR ROGER PARENT, TIMOTHY BRASSELL, FIRE CHIEF ROBERT POTVIN, and STANLEY M. PRZYBLINSKI,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Indiana, South Bend Division
No. S82-0209, Allen Sharp, Judge.

ARGUED SEPTEMBER 12, 1984 -DECIDED DECEMBER 6, 1984

Before BAUER, Circuit Judge, PELL, Senior Circuit Judge, and DUPREE, Senior

District Judge.*

PELL, Senior Circuit Judge. This case presents the question whether the City of South Bend could adopt an affirmative action program for its Police and Fire Departments solely upon the basis of a finding that a disparity existed between the percentage of minorities in the population of South Bend and the percentage of minorities in the Departments. The district court granted summary judgment to defendants-appellees, the City of South Bend and various municipal agencies and officers, holding that the City's statistical comparison justified the implementation of an affirmative action program. On appeal, plaintiff-appellant challenges the court's grant of

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* Franklin T. Dupree, Jr., Senior District Judge for the Eastern District of North Carolina, is sitting by designation.

summary judgment on the grounds that Equal Protection Clause of the Fourteenth Amendment by adopting and implementing an affirmative action program without an adequate finding of past discrimination.

I. Facts

On June 20, 1979, at a meeting of the South Bend Board of Public Safety, the Board appointed a Task Force to design and implement a plan to improve the recruitment of minorities for the Police and Fire Departments. In particular, the Board noted that the percentage of minorities in the population of South Bend was 14.1% and the percentage of minorities in the Fire Department was approximately 5.3%. At this meeting, the Chairman of the Board, Franklin Morse, stated that he believed that the Board could not institute a preferential hiring system without a finding of past discrimination.

The Minority Recruitment Task Force submitted its report to the Board of Public Safety on January 29, 1980. In its report, the Task Force stressed the fact that although minorities requested 28% of the applications for positions in the Fire Department, only 9% of these applications were returned. By comparison, non-minorities returned their applications at a rate of 37%. Emphasizing that the Board's hiring standards were reasonable, the Task Force advocated the continued use of the standards. In fact, in a preliminary report to the Board of Public Safety, the Chairman of the Task Force stated that the Task Force did not find that the hiring procedures were discriminatory. The Task Force recommended, however, that the Board adopt a modified two-to-one preferential hiring plan to reflect,

within five years, the minority composition of the city.

After reviewing the Board's application procedures for the Police and Fire Departments and the report of the Minority Recruitment Task Force, the Minority Recruitment Review presented a written report and recommendation to the Board, which was adopted on June 3, 1980. In its report, the Review Committee also noted the disparity between the percentage of minorities in the Departments and the percentage of minorities in the City and declared, "minority representation on the Police and Fire Department should be consistent with the minority composition of the community." Again, the Review Committee reported that it had reviewed the standards for testing, determined that they were reasonable, and recommended that

they be retained. Nonetheless, the Review Committee recommended that the Departments utilize two separate lists to rank those minority and non-minority applicants who achieved a certain base score on the hiring tests. From each list, a three-member panel would recommend to the Board the number of applicants to be hired. The Board of Public Safety adopted these recommendations and, in keeping with the affirmative action program, decided to hire four minority applicants and one non-minority applicant to the Fire Department. The Board appointed these individuals to the Department in November 1980. Although one minority hiree failed the Pension Board physical examination, the Board replaced him with the next applicant on the minority list in February 1981.

Plaintiff in this case, a white male,

applied to the Fire Department in July 1980 and completed testing in October 1980. On November 3, 1980, he received a letter from the Board of Public Safety informing him that, among other things, he ranked second out of twenty-two applicants on the non-minority hiring list. At his deposition, plaintiff testified that he could not remember when he learned of the minority hirings, but that, in any event, Mr. Robert Potvin, Assistant to the Board of Public Safety, assured him on at least two occasions prior to February 1981 that the Board would hire him as a fire-fighter. Sometime in February 1981, Potvin told plaintiff that he would not be hired and denied ever telling plaintiff that he would be hired. Plaintiff filed a charge of race discrimination with the Equal Employment Opportunity Commission on July

7, 1981, and the Commission issued a right to sue letter on February 18, 1982.

The district court granted defendant's motion for summary judgment on December 29, 1983, and subsequently denied plaintiff's motion to set aside the order granting summary judgment on January 27, 1984. The district court determined that, although the statute of limitations barred plaintiff's EEOC charge because he failed to file it within 180 days of the Board's decision to hire the firefighters, the statute was equitably tolled by Potvin's assurances that plaintiff would be hired. Reaching the merits of defendants' arguments, the district court held that summary judgment should be granted because neither Title VII nor the Fourteenth Amendment prohibited the adoption of an affirmative action program designed to

remedy the statistical disparity between the percentage of minorities in the Fire Department.

II. Analysis

Summary judgment should be granted when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). According to the Supreme Court, the party seeking summary judgment bears the burden of persuading the court that no issue of material fact exists. Adickes v. S. H. Kress & Co., 398 U.S. 144, 157 (1970); United States v. Diebold, Inc., 369 U.S. 654, 655 (1962) (per curiam). See Herman v. National Broadcasting Co., 744 F.2d 604, 607 (7th Cir. 1984). In determining whether an issue of material fact exists, the court must construe the facts alleged

in the light most favorable to the party opposing the motion for summary judgment. Id. See Trulson v. Trane Co., 738 F.2d 770, 771 (7th Cir. 1984).

A. Statute of Limitations

Defendants contend that summary judgment is appropriate because the statute of limitations bars plaintiff's EEOC charge since he did not file it within 180 days after the alleged unlawful employment practice. 42 U.S.C. Sec. 2000e-5 (e). The district court determined that plaintiff failed to comply with the statute of limitations because the date that triggered the statute was either October 28, 1980, when the Board made its hiring decision, or sometime in November 1980, when the actual hiring occurred. Plaintiff did not file his charge until July 7, 1981, well beyond the 180 day

limit under the statute.

The district court decided correctly that the statute of limitations began to run when the Board hired four minority candidates and one non-minority candidate to the Fire Department. In Delaware State College v. Ricks, the Supreme Court held that the 180-day limit begins to run from "'the time of the discriminatory acts, not . . . the time at which the consequences of the acts bec[o]me most painful.'" 449 U.S. 250, 258 (1980) (emphasis in original) (quoting Abramson v. University of Hawaii, 594 F.2d 202, 209 (9th Cir. 1979). Plaintiff's claim that he did not learn of the hiring decision until sometime in the spring of 1981 does not affect the conclusion that plaintiff failed to satisfy the statute of limitations. Of course, the statute may be

tolled if, due to circumstances beyond his control, a person does not learn of the facts supporting his charge within the statutory limitations period. Wolfolk v. Riveria, 729 F.2d 1114, 1117 (7th Cir. 1984). To determine whether a person was prevented from discovering the necessary facts by circumstances beyond his control, the court must inquire "when 'facts that would support a charge of discrimination under Title VII were apparent or should have been apparent to a person with a reasonably prudent regard for his rights similarly situated to the plaintiff.'" Id. (quoting Reeb v. Economic Opportunity Atlanta, Inc., 516 F.2d 924, 931 (5th Cir. 1975)). See Vaught v. R. R Donnelly & Sons Co., No. 83-2534, slip op. at 4 (7th Cir. Aug. 8, 1984); Coleman v. Clark Oil & Refining Co., 568 F. Supp.

1035, 1038-39 (E.D. Wis. 1983). Under this objective test, plaintiff should have learned of defendants' hiring actions at some point within the 180-day limit. Plaintiff concedes that prior to the completion of the testing process he received a copy of a memorandum entitled "Hiring Procedure" that set forth many of the details of the affirmative action program. The Board of Public Safety, in its November 3rd letter to plaintiff, referred to plaintiff's number two ranking as his position on the non-minority hiring roster." Although defendants never informed plaintiff in writing of the Board's hiring decision, the decision was discussed at the Board's public meetings and in the local newspapers. These facts do not warrant a finding that circumstances beyond plaintiff's control pre-

vented him from learning of the hiring decision. At the very least, he should have learned of these facts in February 1981 when Potvin informed him that he would not be hired.

Plaintiff contends that his charge was not time-barred because the discriminatory act - the hiring of four minority applicants and one non-minority applicant - was ongoing until February 1981 when the Board replaced the minority hiree who failed the pension physical with the next applicant from the minority list. The district court rejected plaintiff's theory, finding

> the discretionary acts of selecting and hiring four minority applicants were completed in November, 1980. The act of replacing one of these four minority members with a fifth minority applicant in February of 1981 was a purely ministerial function which did not act to toll the statute of limitations, as it

> was nothing more than the implementation of the selection and hiring decisions of October 28, 1980.

(emphasis in original). Analogizing plaintiff's ongoing violation theory to a continuing violation theory, this court agrees with the district court that the facts in this case fail to support plaintiff's theory. Both Robert Potvin, Assistant to the Board of Public Safety, and Charles Roemer, Chairman of the Board, testified at their depositions that the stated policy of the Board mandated replacing an individual who failed to complete training or to pass the physical with an individual from the same list. Mr. Roemer made this policy public at the Board's October 28, 1980, meeting. Thus, the Board's substitution of one individual who failed the physical with another from the same list did not constitute an

independent decision but rather constituted a further implementation of its original decision to hire four minority applicants. To hold otherwise would undermine the policy underlying the statutory limitations period. According to the Supreme Court, Congress designed the 180-day limit to "protect employers from the burden of defending claims arising from employment decisions that are long past." Delaware State College v. Ricks, 449 U.S. 250, 256-57 (1980) (emphasis added). See Heymann v. Tetra Plastics Corp., 640 F.2d 115, 120 (8th Cir. 1981). In fact, plaintiff challenges as discriminatory in this case the October 28, 1980, hiring decision, not the February 1981 act of replacement.

The district court found that the statute of limitations did not bar plain-

tiff's charge because the statute was equitably tolled until February 1981 by Potvin's assurances to plaintiff that he would be hired. The statute began running again sometime in February 1981 when Potvin informed him that he would not be hired, and plaintiff filed this suit within 180 days after that date. In Zipes v. Trans World Airlines, Inc., the Supreme Court held that the filing requirement "is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling". 455 U.S. 385, 393 (1982). Accord Vaught v. R. R. Donnelly & Sons Co., No. 83-2534, slip op. at 4 (7th Cir. Aug. 8, 1984); Liberles v County of Cook, 709 F.2d 1122, 1125 (7th Cir. 1983), cert. denied, 104 S.Ct. 392. To defeat a motion for

summary judgment alleging that the statute of limitations operates to bar the suit, the party opposing the motion must demonstrate the existence of a disputed material fact that presents a genuine issue for trial. Posey, 702 F.2d at 105. Construing the facts most favorably to plaintiff, this court holds that plaintiff's claim that Potvin assured him that he would be hired raises the question whether the statute was equitably tolled. Because this question merits a trial, the district court correctly determined that summary judgment should not have been granted on the statute of limitations issue.

B. The Affirmative Action Program

According to the Supreme court, employers may adopt affirmative action programs to remedy past discrimination. United Steelworkers of America v. Weber,

443 U.S. 193 (1979); Regents of the University of California v. Bakke, 438 U.S. 265 (1978). Race-conscious programs do not, as a matter of law, violate either Title VII or the Equal Protection Clause of the Fourteenth Amendment. They must, however, be based upon findings of past discrimination by a competent body. Fullilove v Klutznick, 448 U.S. 448, 498 (1980) (Powell, J., concurring); Bratton v. City of Detroit, 704 F.2d 878, 886 (6th Cir. 1983), cert. denied, 460 U.S. 1041. This court agrees with the district court that the Board of Public Safety is a body competent to make findings of past discrimination and to implement an affirmative action program because the Board is the "administrative body legally responsible for the operation of the South Bend Fire Department." Ind. Code Ann. Sec. 36-

8-3-2 (West 1983) (replacing Ind. Code Ann. Sec. 18-1-11-1 (Burns 1974)).

1. Title VII

In United Steelworkers of America v. Weber, the Supreme Court provided guidelines to analyze the validity of an affirmative action plan under Title VII. 443 U.S. 193 (1979). The court there sustained a plan against a Title VII challenge finding that the plan was "designed to break down old patterns of racial segregation and hierachy" and did not "unnecessarily trammel the interests of the white employees." Id. at 208. In Weber, the Court held that Title VII permitted an employer to implement a collectively bargained affirmative action program that required the employer to admit 50% black employees into its craft training program until the percentage of

black craftworkers mirrored the percentage of blacks in the labor force. In upholding the plan, the Court relied upon more than the glaring statistical disparity between the percentage of black craftworkers employed and the percentage of blacks in the workforce. Id. at 198-99. In fact, the Court took judicial notice of the craft unions' history of excluding blacks from membership. Id. at 198 n.1. See Local 35, International Brotherhood of Electrical Workers v. City of Hartford, 625 F.2d 416, 422 (2d Cir. 1980), cert. denied, 453, U.S. 913 (1981). Delivering to promulgate a general test to distinguish between permissible and impermissible affirmative action plans under Title VII, the Court emphasized that the legality of the affirmative action plan under Title VII rested upon a finding of

"conspicuous racial imbalance in traditionally segregated job categories." 443 U.S. at 209 (emphasis added).

Because an affirmative action program must be based upon a finding of past discrimination, this court must determine whether the statistical disparity at issue in this case constitutes a finding of past discrimination. This court concludes that an employer must proffer something more than a finding of a statistical disparity between the percentage of minorities employed and the percentage of minorities within the community to justify the adoption of an affirmative action program. As discussed previously, the Supreme Court's only decision addressing the issue of the validity of an affirmative action plan under Title VII hinged on the Court's finding of purposeful exclusion of blacks

from the craft unions. Weber, 443 U.S. 193. See Local 35, International Brotherhood of Electrical Workers v. City of Hartford, 625 F.2d at 422 (judicial findings of a history of racial discrimination in the construction trades). In a somewhat similar case to this case, the Sixth Circuit acknowledged that statistical data demonstrating an underrepresentation of blacks in the Detroit Police Department constituted evidence of discrimination. Detroit Police Officers' Association v. Young, 608 F.2d 671, 687 (6th Cir. 1979), cert. denied, 452 U.S. 938 (1981). The court, however, premised its decision that the affirmative action program was permissible under Title VII on the presence of other indicia of past discrimination. The court noted that black police officers testified that the Department had custom-

arily discriminated against them while they were on the force, that some evidence suggested that the entry level examinations discriminated against blacks, and that the Department's background investigation procedures created opportunities for discrimination against blacks. Id. at 687, 690.

In the present case, the Board of Public Safety based its finding of past discrimination only upon the statistical disparity between the percentage of minorities in the Fire Department and the percentage of minorities within the population of South Bend. In fact, the Task Force found that the hiring standards were reasonable and should be retained. At a meeting of the Board of Public Safety, the Chairman of the Task Force stated that the past hiring practices were not discrimina-

tory. The courts that have examined the question whether statistical data suffices to prove past discrimination do not agree on a consistent approach to the issue, although most courts would seem to require additional evidence. See, e.g., Bratton, 704 F.2d 878; Local 35, International Brotherhood of Electrical Workers, 625 F.2d 416; Detroit Police Officers' Association, 608 F.2d 671. In any event, under Weber and this court's previous decision in Lehman v. Yellow Freight System, Inc., 651 F.2d 520 (7th Cir. 1981), in which this court stated that statistical data constitutes "the first step in assessing whether [an] employer decides properly to institute an affirmative action plan," id. at 527 (emphasis added), the district court improperly disposed of the matter on a motion for

summary judgment. The court should not have concluded, as a matter of law, that defendants did not violate Title VII by adopting an affirmative action program in response to a finding of past discrimination based solely upon a statistical disparity.

2. Fourteenth Amendment

Although generally the court should not reach a constitutional question if it can dispose of the case on other grounds, this court departs from that approach in this case. Virtually all of the courts that have addressed both Title VII and Equal Protection challgenges to affirmative action plans have analyzed both issues. See, e.g., Bratton, 704 F.2d 878; Local 35, International Brotherhood of Electrical Workers, 625 F.2d 416. The courts have analyzed both the Title VII

and Fourteenth Amendment issues similarly, prompting one court to declare that if a plan passes muster under the more exacting constitutional inquiry, it necessarily withstands challenge under Title VII. Bratton, 704 F.2d 878. This court reaches the merits of plaintiff's Equal Protection claim because the Equal Protection Clause lends even greater support to our decision that the trial court improperly granted summary judgment than does Title VII.

The Supreme Court has not yet articulated the standard of review that applies to racial classifications contained in affirmative action programs. The Court's plurality decisions in Regents of the University of California v. Bakke, 438 U.S. 265 (1978), and Fullilove v. Klutznick, 448 U.S. 448 (1980), demonstrate that the Court is divided over the

question whether the same standard of review applies both to racial classifications built into affirmative action programs and to racial classifications built into other contexts. After reviewing the eleven separate opinions filed in these two plurality decisions, this court agrees with the Sixth Circuit that "the only clear consensus to be garnered from these various statements is that in any affirmative action program (1) some governmental interest must be served, and (2) the program must somehow be directed toward the achievement of that objective." Bratton v City of Detroit, 704 F.2d at 885.

Although the Court in Bakke struck down the University's use of quotas to redress societal discrimination suffered by blacks, five of the Justices acknowl-

edged that the government possesses a substantial and important interest in remedying identified discrimination 438 U.S. at 307, 362 (Powell, J., opinion) (Brennan, J., White, J., Marshall, J., Blackmum, J., dissenting). See also Fullilove v. Klutznick, 448 U.S. 448 (1980) (Burger, C.J., opinion). As with a Title VII challenge, in a case brought under the Fourteenth Amendment, the government must demonstrate that its remedial program responds to a finding of past discrimination. Absent a finding of past discrimination, the government cannot satisfy the first prong of the constitutional test that requires it to articulate a substantial or important governmental interest underlying the affirmative action plan. The Eighth Circuit discussed the reason why the government must make find-

ings of past discrimination before it constitutionally can adopt an affirmative action program:

> Absent findings of past discrimination, courts cannot ascertain that the purpose of the affirmative action program is legitimate. Such findings enable courts to ensure that new forms of invidious discrimination are not approved in the guise of remedial affirmative action.

Valentine v. Smith, 654 F.2d 503, 508 (8th Cir. 1981), cert. denied, 459 U.S. 840 (1982).

Once again, to resolve the question whether defendants have demonstrated an important or substantial interest underlying the affirmative action program, this court must decide whether statistical data constitutes a finding of past discrimination. Under the more exacting constitutional standard, this court now holds that evidence of statistical disparity alone

fails to prove past discrimination and cannot justify the adoption of a remedial plan that may discriminate against non-minorities. Even the four dissenters in Bakke seem to agree that the government needs to proffer something more than statistical evidence of a disparity between the percentage of minorities employed and the percentage of minorities in the population to prove past discrimination:

> [A] State government may adopt race-conscious programs if the purpose of such programs is to remove the disparate racial impact its actions might otherwise have and if there is reason to believe that the disparate impact is itself the product of past discrimination, whether its own or that of society at large.

438 U.S. at 369 (Brennan, J., dissenting) (emphasis added). Defendants failure to put forward any evidence other than evi-

dence of statistical disparity and their own admissions that the hiring practices appeared reasonable and non-discriminatory persuade this court that they have failed to show the necessary finding of discrimination.

Of course, evidence of a statistical disparity between the percentage of minorities employed and the percentage of minorities in the general population could, given the presence of additional evidence, demonstrate the existence of past discrimination. For example, the Sixth Circuit in Bratton v. City of Detroit upheld the Detroit Police Department's affirmative action program against a challenge that the Department had failed to make a finding of past discrimination. 704 F.2d at 887. The court considered the statistical data that the

City offered and decided that, taken together with other evidence, the statistics demonstrated that the Department had practiced intentional discrimination. Id. at 889. The other evidence of intentional discrimination consisted of evidence and testimony relating to "[n]umerous instances of discriminatory practices in hiring, promotion, the ability to transfer from a patrol position to a plain clothes one and the day-to-day treatment of black officers." Id.

In this case, the district court decided incorrectly that evidence of a statistical disparity between the percentage of minorities employed in the Department and the percentage of minorities within the population of South Bend constituted, without more, a finding of past discrimination. Accordingly, the

district court's grant of summary judgment is REVERSED, and this case is REMANDED to the district judge from which this appeal was taken for further proceedings consistent with this opinion.

APPENDIX C

DENIAL OF PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

DATED MARCH 11, 1985

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

MARCH 11, 1985

BEFORE

HON. WILLIAM J. BAUER, Circuit Judge
HON. WILBUR F. PELL, JR.,
Senior Circuit Judge
HON. FRANKLIN T. DUPREE, JR.,
Senior District Judge*

TIMOTHY JANOWIAK,
Plaintiff-Appellant,

No. 84-1321 vs.

THE CORPORATE CITY OF SOUTH BEND, BOARD OF PUBLIC SAFETY, SOUTH BEND FIRE DEPARTMENT, MAYOR ROGER PARENT, TIMOTHY BRASSELL, FIRE CHIEF, ROBERT POTVIN, AND STANLEY M. PRZYBLINSKI,
Defendants-Appellees

Appeal from the United States District Court for the Northern District of Indiana, South Bend Division

No. S82-0209

Allen Sharp, Judge

*Franklin T. Dupree, Jr., Senior District Judge for the Eastern District of North Carolina, is sitting by designation.

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled cause by The Corporate City of South Bend, et al., defendants-appellees, the panel having voted to deny the petition for rehearing, and a majority of the active members of the court having voted to deny a rehearing en banc**

IT IS ORDERED that the petition for rehearing and suggestion for rehearing en banc be, and the same is hereby, DENIED.

**Judge Cudahy would have reheard the case en banc.

APPENDIX D

MEMORANDUM AND ORDER OF THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF INDIANA

JANOWIAK V. CITY OF SOUTH BEND

576 F.Supp. 1461 (N.D. Ind. 1983)

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

TIMOTHY JANOWIAK,

Plaintiff,

vs. CIVIL NO. S82-0209

THE CORPORATE CITY OF
SOUTH BEND,

BOARD OF PUBLIC SAFETY,

SOUTH BEND FIRE DEPARTMENT,

MAYOR ROGER PARENT,

TIMOTHY BRASSELL, Fire Chief,

ROBERT POTVIN,

STANLEY M. PRZYBYLINSKI,

Defendants.

MEMORANDUM AND ORDER

I.

This case was filed pursuant to 42 U.S.C. §§ 1983 and 2000e-2(a)(1), by an individual seeking redress for the putative violation of his civil rights

by an alleged act of employment discrimination. Jurisdiction of this court over the claims presented is predicated on 28 U.S.C. §§1331 and 1343 for the civil rights claim, and 42 U.S.C. §2000e-5(f)(3) for the employment discrimination (Title VII) claim. The matter is presently before this court on defendants' motion for summary judgment.[1]

The gravamen of plaintiff's complaint is that he has been subject to reverse discrimination. Specifically, he complains that he was denied employment as a firefighter by the City of South Bend's Fire Department (Fire Department) solely because of his race (caucasian, white). Plaintiff alleges, and the defendants do not deny, that after submitting to a

series of physical and written examinations between July 19, 1980 and October 7, 1980, plaintiff was ranked second on the list of thirty-one applicants for the position of fire-fighter.

Pursuant to an affirmative action plan adopted by the Fire Department earlier that same year, the list of applicants was in turn divided into two lists: a "minority pool" for non-white applicants, and a "non-minority pool" for white applicants. Nine of the thirty-one applicants were minority members, i.e. black or hispanic, while the remaining twenty-two applicants were white.

On October 28, 1980, it was decided in a public hearing that five applicants would be hired by the Fire

Department. However, rather than simply hire those five individuals with the highest scores (all of whom were white), the Fire Department decided, in keeping with the affirmative action program mentioned above, to hire the four top-scoring applicants from the "minority pool", and the highest scoring applicant from the "non-minority pool". Thus, despite the fact that plaintiff outscored all but one of the white applicants, and all of the minority applicants, he was not considered for employment as a firefighter.

On July 7, 1981, plaintiff filed a charge of employment discrimination against the named defendants with the Equal Employment Opportunity Commission (EEOC). On February 19, 1982, plaintiff received a notice of right to

sue letter from the EEOC, dismissing his discrimination claim. Plaintiff thereupon filed this action, seeking both damages and injunctive relief.

In their motion for summary judgment, defendants raise as their first argument the plaintiff's allegedly untimely filing of his charge with the EEOC. Defendants contend that the plaintiff did not file his employment discrimination complaint with the EEOC within the requisite 180 days, and his failure to do so therefore divests this court of subject matter jurisdiction.

The plaintiff counters by arguing (1) his employment discrimination charge was timely filed with the EEOC; (2) even if not timely filed, the defendants have waived the affirmative

defense of the 180-days statute of limitations by failing to raise it during the EEOC proceedings; or, (3) whether the charge was timely filed or not, the actions of one of the defendants' agents were such that the running of the 180-day time limit was equitably tolled. Each of the above will be addressed in its turn.

Plaintiff's argument that his complaint was timely filed with the EEOC is without merit. It is axiomatic that the untimely filing of a charge with the EEOC renders the Title VII claim or the civil rights claim appended thereto subject to dismissal for failure to meet the statute of limiations. United Airlines v. Evans, 431 U.S. 553, 558 (1977); Heymann v. Tetra Plastics Corp., 640 F.2d 115, 120

(8th Cir. 1981); Stanislaus v. Steorts, 530 F.Supp. 72, 74 (N.D. Ill. 1981).

In order to determine just when the 180-day limit begins to run, one looks first to the language of Section 706(e) of the Civil Rights Action [sic] of 1964: "A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred...." 42 U.S.C. §2000e-5(e)(emphasis added). The Supreme Court has construed "occurred" to mean just that: "[t]he proper focus is upon the time of the discriminatory acts, not upon the time which the consequences of the acts become most painful." Delaware State College v. Ricks, 449 U.S. 250, 258 (1980) (emphasis by the court), quoting

Abrahamson v. University of Hawaii, 594 F.2d 200, 209 (9th Cir. 1979).

Applying the above to the facts of this case, it is clear that the allegedly discriminatory acts occurred either on October 28, 1980, when it was decided to hire four minority applicants and only one non-minority applicant, or sometime in November, 1980, when the actual hiring took place. Irrespective of which date is used, however, plaintiff had substantially exceeded the 180-day time limit when he filed his claim with the EEOC on July 7, 1981. See this court's opinion in Battle v. Clark Equipment, Brown Trailer Division, 524 F.Supp. 683, 686 (N.D. Ind. 1981).

Notwithstanding the above, plaintiff argues that the alleged

discriminatory act was ongoing, from its inception on October 28, 1980, to its "conclusion" in February of 1981, when one of the original four minority applicants was replaced by another minority applicant due to the former's failure to pass one of the subsequent screening examinations. Suffice it to say that this position finds no support in the case law.

Until the Supreme Court's decision in Delaware State College v. Ricks, supra, the general rule was that a discriminatory act was not final, i.e., the 180-day statute of limitations did not begin to run, until the employment position sought by the complainant had been filled. Gates v. Georgia-Pacific Corp., 492 F.2d 292, 294-5 (9th Cir. 1974). Accord, see Dumas v. Town of

Mt. Vernon, Ala., 612 F.2d 974, 978 n. 2 (5th Cir. 1980); Bethel v. Jefferson, 589 F.2d 631, 636 (D.C. Cir. 1978); Egelston v. State Univ. College at Geneso, 535 F.2d 752, 755 (2d Cir. 1976). Irrespective of whether this case law is still valid for the above-stated proposition,[2] it is clear from the facts of this case that the discretionary acts of selecting and hiring four minority applicants were completed in November, 1980. The act of replacing one of these four minority members with a fifth minority applicant in February of 1981 was a purely ministerial function which did not act to toll the statute of limiations, as it was nothing more than the implementation of the selection and hiring decisions of October 28, 1980.

Research by this court has disclosed no cases holding that such a purely ministerial act starts the rerunning of the statutory 180-day time limit. Accordingly, plaintiff's contention that his charge was timely filed with the EEOC is without merit, and must fail.

As his second line of defense to defendants' motion for summary judgment, plaintiff argues that, because defendants did not raise the 180-day statute of limitation defense during the course of the EEOC proceedings, they have waived it as an affirmative defense in this action. This position is also without merit.

At the outset it must be noted that this court is not sitting in appellate review of the administrative

decision rendered by the EEOC in the underlying discrimination charge. Rather, this court is sitting de novo.

Rule 8(c) of the F.R.Civ.P. requires that affirmative defenses be specifically raised in a responsive pleading prior to the filing of the answer. Statutes of limitation are specifically listed as affirmative defenses under F.R.Civ.P. 8(c). Affirmative defenses can be waived or equitably tolled. Generally, 5 Wright & Miller, Federal Practice and Procedure §1278 at 339ff (1969).

In Zipes v. Trans World Airlines, Inc., 455 U.S. 385 (1982), the Supreme Court specifically held that the timely filing of a charge with the EEOC is not a prerequisite to the district court's exercise of jurisdiction over a Title

VII claim. 455 U.S. at 393. However, the Court made clear that a timely filing with the EEOC is tantamount to a statute of limitations, subject to waiver, estoppel, and equitable tolling. Id. Thus, it necessarily follows that, as a statute of limitations rather than a jurisdictional bar, 455 U.S. at 394, the specific pleading of the failure to file in a timely manner mandates the dismissal of the complaint. See, generally, Tillman v. City of Milwaukee, 715 F.2d 354 (7th Cir. 1983); Liberles v. County of Cook, 709 F.2d 1122 (7th Cir. 1983).

Here, the defendants properly raised the issue of the plaintiff's failure to comply with the statutory 180-day time limit of 42 U.S.C. §2000e-5(e) as an affirmative defense

under F.R.Civ.P. 8(c). Because, as noted above, this court is not bound by the underlying administrative proceedings related to the filing of the discrimination charge with the EEOC (indeed, the EEOC proceedings form no part of this court's record herein), the defendants' decision not to raise the affirmative defense of the statute of limitations unless and until the plaintiff's charge gravitated to federal court cannot be construed as a waiver of said defense.

Finally, plaintiff argues that the defendants' "agent", Robert Potvin, told the plaintiff as late as January 1, 1981, that he would be hired despite the October 28, 1980 decision to hire four minority applicants and only one

non-minority applicant. Plaintiff insists that, because of this "promise", defendants are estoppel from raising the statute of limitations as an affirmative defense, presumably on a theory of detrimental reliance.

Plaintiff's allegation is that he was not informed until February 1, 1981, by Mr. Potvin that he, the plaintiff, would not be hired. Mr. Potvin's testimony, as set forth in his deposition, contradicts this. Since there are only 156 days between February 1, 1981 and July 7, 1981, and such a promise if true, would render the statue of limitations subject to equitable tolling under Zipes v. Trans World Airlines, Inc., supra, a genuine issue of material fact exists. Construing the facts in a light most

favorable to the non-movant plaintiff, it is apparent that summary judgment is inappropriate on the preliminary defense of the statute of limitations. Accordingly, this court must turn now to an examination of the merits of plaintiff's claim.

II.

The moving party bears the burden of clearly establishing the absence of any genuine issues of fact material to judgment in his favor. Adickes v. S. H. Kress & Co., 398 U.S. 144, 157-61, (1970). Even so, the non-moving party opposing summary judgment must "set forth specific facts showing that there is a genuine issue for trial," in order to defeat the motion. F.R.Civ.P. 56(e). A careful examination of the complete file

reveals that the plaintiff has failed to establish the existence of any disputed fact issues warranting the denial of defendants' motion, i.e., plaintiff has failed to come forward with anything to controvent the evidence proffered by the defendants regarding the alleged "impropriety" of their actions.

Analyses of reverse discrimination attacks on affirmative action plans generally proceed under one of two theories: Title VII or the Fourteenth Amendment.[4] At the risk of being accused of oversimplification, the legality of affirmative action plans under Title VII must be measured against the standards set forth in United Steelworkers of America, AFL-CIO-CLC, v. Weber, 443 U.S. 193 (1979),

while the constitutionality of such plans under the Fourteenth Amendment (and, a fortiori, under 42 U.S.C. §1983) must be measured against the criteria enunciated in Regents of University of California v. Bakke, 438 U.S. 265 (1978).

In an extremely careful and well reasoned opinion that is almost on all fours with the case now before this court, the Court of Appeals for the Sixth Circuit outlined the distinctions between Title VII and Fourteenth Amendment analyses involving municipal affirmative action plans. Bratton v. City of Detroit, 704 F.2d 878 (6th Cir.), as modified, 712 F.2d 222 (1983). To survive scrutiny under Title VII, an affirmative action plan

(1) must be aimed at breaking down prior patterns of segregation and racial hierarchy, (2) it must not "trammel" unnecessarily the interest of non-minority members, viz, whites, and (3) it must be a purely temporary measure, "to end when the manifested racial imbalance no longer exist[s]." 704 F.2d at 883-84. An important corollary to the above is that a public employer adopting such an affirmative action plan will be insulated from Title VII liability. Id.; Williams v. City of New Orleans, 694 F.2d 987 (5th Cir. 1982); La Riviere v. EEOC, 682 F.2d 1275, 1279 (9th Cir. 1982); Boston Chapter, NAACP v. Beecher, 679 F.2d 965 (1st Cir. 1982), vacated on other grounds, ___ U.S. ___, 103 S.Ct. 2076 (1983).

On the other hand, constitutional analysis under the Fourteenth Amendment is stricter, i.e., the standard to be applied is one of "strict scrutiny." Bratton, 704 F.2d at 886, citing Bakke, 438 U.S. at 361-62. Specifically, there must be a showing that (1) some governmental interest is being served, and (2) the program is directed towards the achievement of that objective. Bratton, 704 F.2d at 885.

However, where as here the discrimination complained of is directed against those not "traditionally discriminated against," the words "strict scrutiny" take on a different shade of meaning:

> [A] case involving a claim of discrimination against members of the white majority is not a simple mirror image of a case involving claims of discrimination against minorities. One

> analysis is required when those for whose benefit the Constitution was amended or a statute enacted claim discrimination. A different analysis must be made when the claimants are not members of a class historically subjected to discrimination. When claims are brought by members of a group formerly subjected to discrimination the case moves with the grain of the Constitution and national policy. A suit which seeks to prevent public action designed to alleviate the effects of past discrimination moves against the grain....

Detroit Police Officers' Association v. Young, 608 F.2d 671, 697 (6th Cir. 1979), cert. denied, 452 U.S. 938 (1981), as quoted in Bratton, supra, at 886.

Before addressing the factual merits of defendants' position, one

final note: assuming from the above that the constitutional standard under Bakke is more exacting than that set forth in Weber, it follows that "the Title VII challenge ... is necessarily subsumed into [sic] that made here under the Fourteenth Amendment; what is valid under the latter will certainly pass muster under Title VII." 704 F.2d at 887 (footnote omitted).

Turning now to an examination of the factual merits of defendants' position, it is clear that they are entitled to summary judgment.

The local government has an undeniably significant interest in mitigating adverse effects of discrimination. Fullilove v. Klutznick, 448 U.S. 448, 497 (1980) (Powell, J., concurring). However, a caveat to the

above is that:

> A direct showing of past intentional discrimination is not required to establish the existence of the interest.... It is sufficient if findings are made by a body with the competence to act in this area and a review of those findings reveals "a sound basis for concluding that minority underrepresentation is substantial and chronic, and that the handicap of past discrimination is impeding access [and promotion] of minorities." Detroit Police Officers v. Young, 608 F.2d at 694 (quoting Bakke, 438 U.S. at 362, 98 S.Ct. at 2784).

704 F.2d at 886 (footnote omitted).

A careful review of the uncontroverted pleadings discloses that the minority population of the City of South Bend exceeded 14% in 1970, and was 20.7% in 1980 (18.3% black, 2.4% hispanic). In 1980, however, the City

of South Bend's Fire Department had barely 6% minority representation. Thus, and irrespective of the question whether there had ever been any overt or deliberate discrimination against minorities by the defendants, the decision of the Board of Public Safety of the City of South Bend on June 3, 1980, to implement an affirmative action program to redress this imbalance and bring the Fire Department's minority representation more closely into line with the City's population, was consistent with the holding of Fullilove, supra.

Turning now to the determination of whether the remedial measures employed were and are reasonable, this court concludes that they are.

The City's Board of Public Safety adopted a plan of limited duration (five years) in which there are two different pools of applicants, one consisting of minority members, the other of non-minority members. Hiring needs were and are to be met by filling available employment slots with the most qualified applicants from each pool, with a numerical slant in favor of the minority pool's applicants until the Fire Department's racial composition is more in line with that of the City's general population.

The City's Board of Public Safety is "a body with the competence to act in this area," 704 F.2d at 886, being the administrative body legally responsible for the operation of the

South Bend Fire Department. Ind. Code §36-8-3-2.

A determination of "reasonableness" for purposes of ascertaining the constitutionality of affirmative action programs is not measured against the "reasonable man" test so familiar to students of tort law. Rather, determining whether the remedial measures employed are reasonable includes the following:

> an examination of whether any discrete group or individual is stigmatized by the program and whether racial classifications have been reasonably used in light of the program's objectives. Regents of the University of California v. Bakke, 438 U.S. at 372-76, 98 S.Ct. at 2790-92; Fullilove v. Klutznick, 448 U.S. at 518-19, 100 S.Ct. at 2795. If the affirmative action plan satisfies these criteria, it does not violate the equal protection clause of the Fourteenth Amendment. Detroit Police Officers Association

v. Young, 608 F.2d at 694. Accord United States v. City of Miami, Florida, 614 F.2d 1322, 1338 (5th Cir. 1980), modified, 664 F.2d 435 (1981) (en Banc).

704 F.2d at 887.5

As noted above, an examination of the record compiled in this action in light of these standards reveals that the defendants' affirmative action plan is reasonable as a matter of law.

Because defendants' affirmative action program survives constitutional scrutiny, under which the Title VII legality claims are subsumed, there is an absence of any genuine issues of material fact now before this court. Accordingly, defendants' motion for summary judgment is hereby GRANTED in their favor, and against plaintiff. CASE DISMISSED.

Entered this 29th day of December, 1983.

[signed] Allen Sharp
Chief Judge
United States District Court

FOOTNOTES

(1) At a hearing held in open court on September 24, 1982, the parties were given to and including April 1, 1983, in which to file any summary judgment motions. On April 1, 1983, defendants filed their motion for summary judgment. The plaintiff responded indirectly to the motion for summary judgment by filing a motion for leave to file an amended complaint on April 25, 1983. Leave to amend was granted on April 29, 1983. Then, on June 1, 1983, plaintiff filed a motion in opposition to defendants' motion for summary judgment. The defendants filed

a supplemental memorandum in support of their motion on July 13, 1983, and a second hearing was then held in open court the following day on said motion. The plaintiff having filed his supplemental brief in opposition to the motion for summary judgment on October 11, 1983, and the defendants having filed their second supplemental memorandum in support of said motion on October 12, 1983, this matter is now ripe for ruling.

(2) A careful reading of Delaware State College v. Ricks, 449 U.S. at 255, 256, calls into serious question the continued viability of Egelston v. State Univ. College at Geneso, 535 F.2d 752 (2nd Cir.

1976) and those of its ilk.

(3) Mr. Potvin insists in his deposition at p. 37 that he only indicated plaintiff might be hired, i.e., Mr. Potvin "did not know."

(4) The analysis of claims proceeding under 42 U.S.C., §1983 is indentical [sic] to that under the Fourteenth Amendment where affirmative action plans are at issue. Bratton v. City of Detroit, 704 F.2d 878, 883 n. 15 (6th Cir.) as modified, 712 F.2d 222 (1983). Thus, and for the purposes of this case, whenever the words "Fourteenth Amendment" are used, 42 U.S.C. §1983 may be substituted.

(5) This is not to say that affirmative action is without its serious detractors. See, e.g., that scathing attack on such policies in N. Glazer, Affirmative Discrimination: Ethnic Inequality and Public Policy (1975).

APPENDIX E

MEMORANDUM AND ORDER

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF INDIANA

JANOWIAK V. CITY OF SOUTH BEND

DATED JANUARY 27, 1984

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

TIMOTHY JANOWIAK,	)	
	)	
Plaintiff	)	
	)	
v.	)	No. S82-209
	)	
THE CORPORATE CITY OF SOUTH BEND, et al.	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER

This case is presently before the court on plaintiff's Motion to Set Aside Order Granting Summary Judgment. In said motion, plaintiff raises five grounds in support of his contention that the granting of summary judgment on December 29, 1983, was improper. Four of those grounds, captioned as Specifications One, Three, Four and Five, are without merit and/or have already been addressed by this court,

and will not be discussed further.

Unlike the other four grounds, however, plaintiff's Specification Two touches on a pivotal issue: whether the absence of any clear showing of past, overt discrimination on the part of the defendants renders unconstitutional their implementation of the affirmative action plan in question. Plaintiff contends that it does, and at page six of his Brief in Support of Motion to Set Aside Order Granting Summary Judgment, he quotes from Justice Powell's concurring opinion in Fullilove v. Klutznick, 448 U.S. 448 (1980):

> Because the discrimination between permissible remedial action and impermissible racial preference rests on the existence of a constitutional or statutory violation, the legitimate interest in

> creating a race-conscious remedy is not compelling unless an appropriate governmental authority has found that such a violation has occurred.

448 U.S. at 498.

From the above, plaintiff argues, it follows that, absent a clear showing of "a constitutional or statutory violation," the implementation of an affirmative action plan constitutes an impermissible denial of equal protection against the affected parties, viz., white males.

However, in the same Fullilove opinion, Justices Marshall, Brennan and Blackmun make clear their disagreement with the strict test Justice Powell advocates. At pages 518-19 these justices stated the following:

> We recognize, however, that these principles outlawing

> the irrelevant or pernicious use of race were inapposite to racial classifications cations that provide benefits to minorities for the purpose of remedying the present effects of past racial discrimination. Such classifications may disadvantage some whites, but whites as a class lack the "'traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.'" Because the consideration of race is relevant to remedying the continuing effects of past racial discrimination, and because governmental programs employing racial classifications for remedial purposes can be crafted to avoid stigmatization, we concluded that such programs should not be subjected to conventional "strict scrutiny" -- scrutiny that is strict in theory, but fatal in fact.

(footnotes and citations omitted.)

What Justices Marshall, Brennan and Blackmun are here saying is precisely what the Sixth Circuit held in Bratton v. City of Detroit, 704 F.2d 878 (6th Cir.), as modified, 712 F.2d 222 (1983), cert. denied, -- U.S. --, (1984):

> (A) case involving a claim of discrimination against members of the white majority is not a simple mirror image of a case involving claims of discrimination against minorities. One analysis is required when those for whose benefit the Constitution was amended or a statute enacted claim discrimination. A different analysis must be made when the claimants are not members of a class historically subjected to discrimination. When claims are brought by members of a group formerly subjected to discrimination the case moves with the grain of the Constitution and national policy. A suit which seeks to prevent public action designed to alleviate the effects of past

> discrimination moves against the grain....

Id. at 886. Further, and as this court noted in its decision by memorandum and order, "(a) direct showing of past intentional discrimination is not required to establish the existence of the (protected) interest..." Janowiak v. The Corporate City of South Bend, --F.Supp.--, -- (N.D. Ind. 1983), slip op. at 11, quoting from Bratton, supra, 704 F.2d at 886.

It is clear that the legal question raised is a close one. However, plaintiff is not raising any issue, factual or legal, regarding the need for a showing of past intentional discrimination on the part of the defendants, that has not already been addressed by this court, and this court

sees no reason to set aside its earlier ruling thereon.

Accordingly, and for the above stated reasons, plaintiff's motion to set aside the entry of summary judgment is hereby DENIED.

Entered this 27th day of January, 1984.

[signed] Allen Sharp
CHIEF JUDGE, UNITED STATES DISTRICT COURT

cc: V. McFadden
R. Hill

Office-Supreme Court, U.S.
FILED
JUL 11 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1936

In The
Supreme Court of the United States
October Term, 1984

THE CORPORATE CITY OF SOUTH BEND, BOARD OF PUBLIC WORKS, SOUTH BEND FIRE DEPARTMENT, MAYOR ROGER PARENT, TIMOTHY BRASSELL, FIRE CHIEF, ROBERT POTVIN, BOARD OF PUBLIC SAFETY and STANLEY M. PRZYBYLINSKI, BOARD OF PUBLIC SAFETY

Petitioners,

v.

TIMOTHY JANOWIAK

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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Attorney for Respondent

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RESTATEMENT OF QUESTION PRESENTED FOR REVIEW

Respondent respectfully disagrees with the petitioners' statement of the question presented for review. The following is a more factually accurate statement of the question which would emerge from examination of the record below:

> Does 42 U.S.C. § 2000(e) and the Constitution permit a public employer to adopt an affirmative action plan that discriminates against non-minority applicants where the only evidence of discrimination against minority applicants is that their percentage of representation on a municipal fire department is less than their percentage of population in the community?

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Respondent, Timothy Janowiak, respectfully requests that this Court deny the petition for a Writ of Certiorari, seeking review of the opinion below by the United States Seventh Circuit Court of Appeals. That opinion is reported at 750 F. 2d 557 (7th Cir. 1984), and is contained in petitioners' Appendix at pages 6a-3a.

Respondent accepts petitioners' titled parties, Reports of Opinion below (Pet. 1), and Jurisdiction (Pet. 2), and Constitutional and Statutory Provisions (Pet. 2, 3). The jurisdictional statement is accepted only to the extent it concerns jurisdictional and not substantive issues.

STATEMENT OF THE CASE

Respondent believes petitioners' Statement of the Case and Facts (Pet. 3 through 9), are accurate and adopts the same, with two additions:

A. Respondent had the second highest test score of all applicants.

B. One of four (4) minority recruits hired failed a pension physical, and was replaced with another minority applicant.

REASONS WHY THE WRIT SHOULD BE DENIED.

A. Respondent prays this Court to deny petitioners' Request for a Writ of Certiorari for the reason that the 7th Circuit Court of Appeals did not error in holding that mere numerical disparity between the percentage of minorities in the defendant Fire Department and the percentage of minorities within the City of South Bend was insufficient to justify implementation of an affirmative action plan.

The cases cited by petitioners do not support the proposition that mere statistical disparity is sufficient grounds for adoption of an affirmative action plan, or if they do, are in conflict with

Regents of the University of California v. Bakke, 438 U.S. 265 (1978) and other Supreme Court decisions.

It has been established by this Court that in order to adopt and implement an affirmative action plan, the " . . . governmental body must have the authority to act in response to identified discrimination. Second, the governmental body must make findings that demonstrate the existence of illegal discrimination." Fullilove v. Klutznick, 448 U.S. 448, 65 L.Ed. 2d, 902, p. 937, 100 S. Ct. 2758.

Petitioners suggest that the Court of Appeals misinterpreted the Weber decision, and state that all that needs to be demonstrated is mere statistical disparity of numbers for a plan to survive Title VII scrutiny.

The Appellate Court, in its Opinion rendered December 6, 1984, correctly noted that this Court in Weber emphasized that the legality of the

affirmative action plan under Title VII rested upon a finding of " . . . conspicuous racial imbalance in traditionally segregated job categories." Weber, supra, 443 U.S. at 209.

As the Appellate Court noted at page nine (9) of its December 6, 1984, Opinion, " . . . as discussed previously, the Supreme Court's only decision addressing the issue of an affirmative action plan under Title VII hinged on the Court's finding of purposeful exclusion of blacks from the craft unions." Weber, supra, 443 U.S. 193

Furthermore, this Court's inquiry in Weber was " . . . the narrow statutory issue of whether Title VII forbids private employers and unions (emphasis added) from voluntarily agreeing upon bona fide affirmative action plans that accord racial preferences in the manner and purposes provided in the Kaiser-USWA plan . . . " Weber, 61 L.Ed. 2d, pp. 487-488.

It is not insignificant that the instant case

involves a governmentally imposed affirmative action plan, and not a voluntary private agreement of the type attacked in Weber, and in Lehman v. Yellow Freight System, Inc., 651 F. 2d 520 (7th Cir. 1981). In fact, as the 7th Circuit Court of Appeals noted in Lehman, statistical data constitutes " . . . the first step (emphasis added) in assessing whether (an) employer decides properly to institute an affirmative action plan." Lehman, supra, p. 257.

Although race-conscious plans do not as a matter of law, violate Title VII, they must be based upon findings of past discrimination. Fullilove V. Klutznick, 448 U.S. 448, 498 (1980); Bratton v. City of Detroit, 704 F. 2d 878, 886 (6th Cir. 1983), Cert. denied, 460 U.S. 1041.

Petitioners cite Weber to support its contention that in its reversal of the 5th Circuit, the Supreme Court did not find in the record any evidence of wrongdoing which might have been overlooked

by the lower courts. Petitioners ignore the concession made by Kaiser that its hiring practices were subject to question, Weber, supra, p. 493, and further ignore Justice Blackmun's position that the majority opinion (in Weber) authorizes affirmative action plans if the job category has been "traditionally segregated. Weber, supra, p. 494.

Another distinguishing feature in Weber was that the majority of the Court found that the voluntary plan did not unnecessarily trammel the interests of the white employees. The Court noted that the plan did not require the discharge of white employees, nor did the plan create an absolute bar to the advancement of white employees, as half of those trained in the program would be white. Weber, supra, 492.

In the instant case, the plan adopted by the petitioners was a quota, which did create an absolute bar for all but one white employee. As noted

previously, Weber involved a voluntary, private plan, and not a government imposed plan that from the evidence adduced from the Board of Public Safety minutes did not even pay lip service to non-minority applicants.

The petitioners' claim that the Opinion rendered below is in conflict with Weber and similar cases is misplaced. It is petitioners who have misread Weber, and not the 7th Circuit Court of Appeals.

Petitioners cite Bushey v. N.Y. State Civil Service Commission, 733 F. 2d 220, (2nd Cir. 1984) as support for its assertion that statistical disparity alone validates an affirmative action plan and insulates it from Title VII attack.

The "statistical disparity" in Bushey involved an administrative examination wherein the passing rate for minorities was approximately one-half the passing rate for non-minorities. In Bushey, the testing procedures themselves were found to have a

significant discriminatory impact upon minorities. Bushey does not stand for the proposition advanced by petitioners and did not even touch upon the issue argued herein, namely, that underrepresentation of a particular group, race, etc., without meaningful inquiry as to the reasons for said underrepresentation, is insufficient to establish an affirmative action plan which discriminates against others.

Furthermore, in Bushey, the Second Circuit noted that:

> "A prima facie violation of Title VII may be established by statistical evidence showing an employment practice has the effect of denying members of one race equal access to employment opportunites." Bushey, supra, 224.

Neither Weber, supra, nor Bushey, supra, and certainly not Regents of the University of California v. Bakke, 438 U.S. 265 (1978), support the assertion made by petitioners that mere statistical disparity of numbers is sufficient evidence upon

which a governmentally imposed racial hiring quota can be imposed.

Regarding petitioners' contention that a conflict exists between the 7th Circuit in its Opinion below, and the Ninth Circuit, in Johnson v. Transportation Agency, Santa Clara County, California, 748 F. 2d 1308, (9th Cir. 1984), a conflict perhaps does exist.

That case stands for the apparent proposition that mere numerical disparity justifies implementation of an affirmative action plan. It is significant to note, however, that plaintiff Johnson did not bring an action under 42 USC 1983, but for reasons best known to Johnson, opted to proceed solely under Title VII, 42 USC 2000(e). As this Court noted in Bakke, supra, the constitutional standard to be applied is one of strict scrutiny, as racial and ethnic distinctions of any sort are inherently suspect. Bakke, supra, p. 751. As noted in Bakke, where appropriate

findings of discrimination are made, a government may take race into account to remedy disadvantages cast on minorities. Bakke, supra.

To the extent that Johnson, supra, did not deal with a Fourteenth Amendment claim by plaintiff, that case is distinguishable. To the extent that Johnson holds numerical disparity is sufficient to insulate an employer from attack under Title VII, 42 USC 2000(e), that case is in conflict with Bratton, Fullilove, supra, and Bakke, supra, the latter two cases being of precedental import by virtue of being opinions of the United States Supreme Court.

Petitioners further allege a conflict between the 7th Circuit ruling and the Eighth Circuit, Warsocki v. City of Omaha, 726 F. 2d 1358 (8th Cir. 1984) and Sixth Circuit. Bratton v. City of Detroit, 704 F. 2d 878 (6th Cir. 1983), Cert. denied, ___U.S.___, 104 S. Ct. 703 (1984).

Warsocki held as follows that:

". . . to establish the bona fide nature of an affirmative action plan, an employer must show that its affirmative action plan was a response to a conspicuous racial imbalance in its workforce." Warsocki, supra, p. 1360.

Regarding Warsocki, the trial court granted the defendant's Motion to Dismiss after plaintiff had rested his case. The Eighth Circuit noted that the burden was on the defendant to demonstrate that its affirmative action plan was substantially related to the objective of remedying past discrimination, in a reverse discrimination suit. Warsocki, p. 1360.

Bratton v. City of Detroit, 704 F. 2d 878 is cited by petitioners as holding in conflict with the Opinion below. Petitioners quote the following passage from Bratton as support for their position that mere statistical disparity of numbers is sufficient evidence to insulate an employer from consititutional attack:

"A direct showing of past intentional discrimination is not required to

> establish the existence of this interest (to establish a valid governmental interest and to uphold an affirmative action plan). Bratton, supra, p. 886.

The above citation, respondentasserts, is taken out of context. Bratton held, inter alia, that to survive Title VII scrutiny, an affirmative action plan must be aimed at breaking down prior patterns of segregation, and racial hierarchy, and must not unnecessarily "trammel" non-minority interests. Bratton, supra, p. 884. Furthermore, the Court in Bratton noted that the record supported:

> " . . . numerous instances of discriminatory practices in hiring, promotion . . . and the day to day treatment of black officers evidenced a systematic exclusion of blacks from any meaningful role on the Detroit Police Department." Bratton, supra, p. 889.

The Court further held that a court, in passing on the constitutionality of an affirmative action plan, must determine as a threshhold matter that discrimination against minorities exists. Bratton,

supra, p. 886. There exists no conflict between the Seventh and Sixth Circuits.

Despite petitioners' assertions to the contrary, with the possible exception of Johnson v. Transportation Agency, Santa Clara County, California, 748 F. 2d 1308 (9th Cir. 1984), not a single case supports petitioners' claim that all a public employer needs to show to establish a race conscious hiring plan, is that minority representation on a given fire department is not in line with minority representation in the community as a whole. That is not the law.

Petitioners' contentions that the Seventh Circuit's Opinion renders it virtually impossible for a public employer to ever adopt an affirmative action plan is without merit.

Voluntary affirmative action plans adopted by public employers have survived attack, as this Court is well aware. The problem encountered by petitioners is that the evidence, or lack thereof

below, contained in the South Bend Board of Safety Minutes and Reports made in connection with the City's drive to establish an affirmative action plan, reveals a total lack of meaningful inquiry as to whether such a plan was needed. The rights of non-minority applicants were totally ignored. The true motivations of petitioners are certainly open to question when its (petitioners) own task force found the existing testing procedures fair, reasonable and non-discriminatory.

Lastly, as this Court opined in Bakke, supra, where appropriate findings of discrimination are made, a government may take race into account to remedy disadvantages cast on minorities. Bakke, supra, 438 U.S. 265, 57, L.Ed. 2d 750, 98 S. Ct. 2773.

CONCLUSION

The decision reached by the Seventh Circuit Court of Appeals was correct. Before the right of non-minority citizens can be infringed upon in hiring and promotion practices by a public employer, evidence that indicates discrimination against minorities exists, must be shown.

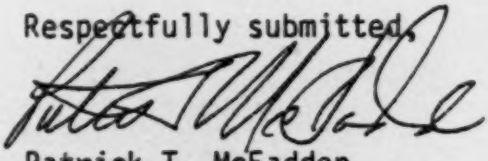
In the case below, the Task Force appointed by the petitioner City, found the pre-1980 testing procedures to be fair, reasonable, and non-discriminatory. (Pet. Appendix 9a, 10a, 11a). The Seventh Circuit correctly held that an employer must proffer something more than a finding of statistical disparity between the percentage of minorities employed and the percentage of minorities within the community to justify the adoption of an affirmative action plan.

Finally, lest the crux of the Appellate Court's decision be forgotten, the ruling of

December 6, 1984, simply held that the district court errored in granting petitioners' Motion for Summary Judgment. Whether or not the petitioners' actions were reasonable, and further, did not unnecessarily trammel the interests of non-minorities, presented issues of fact and law that should have precluded the granting of Summary Judgment.

For all the reasons set forth herein, the respondent respectfully prays that the petition be denied.

Respectfully submitted,



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